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No. 99-1427

IN THE
Supreme Court of the United States
OCTOBER TERM 1999

COMPETITION POLICY INSTITUTE,
Petitioner,

v.

U S WEST, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONER

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19 pp

QUESTIONS PRESENTED

1. Whether Federal Communications Commission rules that require local telephone companies to obtain affirmative customer consent before using or disclosing customer proprietary network information ("CPNI") restrict any local telephone company's protected "commercial" free speech under the First Amendment.

2. To the extent such First Amendment rights are implicated, whether the FCC's rules meet this Court's criteria for government regulation of such speech.

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The National Association of Regulatory Utility Commissioners ("NARUC") is supported predominantly by dues paid by its State Public Utility Commission members and through revenues generated by triennial meetings of those members. NARUC has no parent company, subsidiary, or affiliate.

Parties to the case include, MCI Telecommunications Corporation, Airtouch Communications, Inc., Pacific Bell, Sprint Corporation, AT&T Corporation, Nevada Bell, SBC Communications, Inc., BellSouth Corporation, Southwestern Bell Telephone Company, Competitive Telecommunications Association, Frontier Corporation, and Competition Policy Institute.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. COMMERCIAL FREE SPEECH CONCERNS ARE NOT IMPLICATED BY THE FCC'S CPNI RULES 7

II. EVEN IF WE ASSUME, ARGUENDO, COMMERCIAL FREE SPEECH CONCERNS ARE IMPLICATED BY THE FCC'S CPNI RULES, THE FCC HAS MET THE SUPREME COURT'S CRITERIA FOR GOVERNMENT REGULATION OF SUCH ACTION 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **PAGE**

Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) 10, n11

Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) 4,6,9,10

Chevron U.S.A, Inc.. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11,n14

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 434 (1993) 9

Edenfield v. Fane, 507 U.S 761 (1993) 7

Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) 7,10, n12

Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982) 2

Martin v. Struthers, 319 U.S. 141 (1943) 7

Reno v. Condon, 120 S.Ct. 666(2000) 3,11,n13

Sheets v. Salt Lake County, 45 F.3d 1383 (10th Cir.1995).... 7

U S West v. FCC, 182 F.3d 1224 (10th Cir. 1999) ..... *passim*

United States v. Southern Motor Carrier Rate Conference, et al., 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985) 2

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....7

Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976).....2

CONSTITUTIONAL PROVISIONS

U. S. CONST. amend. I.....*passim*

STATUTES

Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act").....5

Fair Credit Reporting Act, 15 U.S.C. § 1681(r) (Supp. III 1997) 8, n10

Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1994).....8, n10

18 U.S.C. §§2510-2522.....8

18 U.S.C. § 3121.....8

47 U.S.C. § 410(c).....2

47 U.S.C. § 222 5,8

47 U.S.C. § 222(a) 5

47 U.S.C. § 222(c)(1) 5

47 U.S.C. § 551 8

SUPREME COURT RULES

U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A. 1

U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A. 1

ADMINISTRATIVE RULES

Implementation of the Telecommunications Act of 1996, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, 63 Fed. Reg. 20,326 (1998) ("*CPNI Order*") ..... *passim*

OTHER MATERIALS

Marc Rotenberg, *The Privacy Law Sourcebook 1999: United States Law, International Law, and Recent Developments 1-173 (1999)* 8, n10

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INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications common carriers within their respective borders.

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1 In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC's General Counsel authored this brief, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[2]

The State pubic service commissioners NARUC represents are very concerned by the ruling of the court of appeals presented for review. Although not parties to the original appeal, NARUC's members have a direct and significant interest in its outcome. Specifically, *the 10th Circuit's invalidation of the FCC's CPNI rules on federal constitutional grounds has the potential to circumscribe or otherwise inhibit similar State action on the same or related issues involving both telecommunications and other regulated utilities.* Unless reversed, the 10th Circuit's decision potentially compromises State commission authority to prevent the distribution of utility consumers' personal information without their consent in a variety of contexts.

Moreover, NARUC is concerned about the possible impact of the 10th Circuit decision on the appeals process itself. As Judge Briscoe's dissent strongly suggests, the

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2 See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. See, also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See *also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

majority opinion is flawed in both its departures from settled rules of statutory construction and from the proper role of federal courts in assessing the constitutionality of agency rules.[3] The decision (1) misapplies First Amendment jurisprudence to agency action that does not restrict speech by finding that the FCC's CPNI rules regulating the release of consumer information somehow implicates common carriers' commercial free speech rights, and (2) conflicts with this Court's decision in, *inter alia*, *Reno v. Condon*, 120 S. Ct. 666 (2000), which holds that Congress has the constitutional authority to decide that an entity can be barred from disclosing certain information about a person unless it obtains that individual's express consent.

SUMMARY OF ARGUMENT

The FCC's CPNI rules do not result in an unconstitutional infringement of common carriers' commercial free speech rights. The majority decision expands the 1st Amendment "commercial speech" protections to shelter carriers' commercial exploitation of millions of customers' personal calling habits.

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[3] See, generally, Judge Briscoe's dissent, *U.S. West v. FCC*, 182 F.3d 1224, 1240-1248 (Petitioner CPI's Appendix ["Pet. App."] at 34a-54a) (10th Cir. 1999) where the Judge points out, given the procedural posture of the case, the majority's (1) inappropriate apparent focus on the constitutionality of § 222 of the Act rather than the CPNI order challenged by US West, (*Id.* at 1243-1244, 1245, Pet. App. at 42a-43a, 47a) (2) its flawed analysis of the FCC's review of the opt-out alternative, (*Id.* at 1245-1246, Pet. App. at 50a – 51a) and (3) its faulty use of certain rules of statutory construction., (*Id.* at 1242 –1243, Pet. App. at 41a)

Most of these customers currently have no alternative to their telephone companies' monopoly service. The majority opinion does not address either (1) the fact that the information subject to the FCC's rules belongs to the customers and not to the carriers, or (2) the related argument that the companies thus have no right to use it outside the limited scope of the implied customer consent under which they obtained the information. Moreover, the opinion does not persuasively rebut arguments that the rules do not in anyway restrict the *content* of any carrier communication to a customer.

However, even if one assumes that carriers' First Amendment commercial free speech rights are implicated by the CPNI rules, the restrictions promulgated by the FCC fall well within the range of permissible government action. Commercial speech restrictions are "upheld where the government shows (1) that it has a substantial interest in regulating the speech, (2) that the regulation directly and materially advances that interest and (3) that the interest would not be served as well by more limited restrictions." [4]

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[4] In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York ("Central Hudson")*, 447 U.S. 557 at 564, 566 (1980), the Supreme Court articulates a test to determine when an agency restriction on commercial speech violates the First Amendment. If the subject speech concerns lawful activity and is not misleading, then the government may regulate the speech if it can demonstrate "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."

As discussed below, the FCC decision meets all three criteria.

ARGUMENT

The Telecommunications Act of 1996[5] requires all carriers "to protect the confidentiality of proprietary information of . . . customers."[6] Specifically, carriers are precluded from disclosing consumer proprietary network information or "CPNI" received as a result of providing service without customer approval, subject to narrow exceptions.[7] Pursuant to 47 U.S.C. § 222, the FCC promulgated regulations interpreting the statute in the February 26, 1998 *CPNI Order*. See, *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 63 Fed. Reg. 20,326, 13 FCC Rcd 8061 (1998) (hereinafter "*CPNI Order*").

In *U.S. West, Inc. v. FCC ("US West")*, 182 F.3d 1224 (10th Cir. 1999), the 10th Circuit, in a split decision subsequently upheld on rehearing by another deeply divided panel, invalidated that FCC order.

CPNI include a *customer's* calling records with personal information on who is called, when, for how long, and how often. The *CPNI Order* adopted an opt-in approach – requiring carriers to get a *customer's* express

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5 Pub. L. No. 101-104, 110 Stat. 56. (1996).

6 *Id.* at § 702(a), 47 U.S.C. § 222(a) (Supp. III 1997).

7 *Id.* at § 702(c)(1), 47 U.S.C. § 222(c)(1) (Supp. III 1997).

approval before the company can divulge *that customer's* CPNI, as opposed to an opt-out approach, which requires customers to contact their carrier to prevent it from disclosing *that customer's* CPNI.

The majority's opinion finds the CPNI Order is inconsistent with carriers' First Amendment commercial free speech rights. Utilizing the *Central Hudson* analysis, the Court concluded that even if "the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information," and assuming that the CPNI Order directly and materially advanced the State's interest, the regulations were impermissible because they were not narrowly tailored. *U.S. West*, 182 F.3d at 1236. While declining to order the FCC to adopt an opt-out approach, the majority discussed the availability of less burdensome alternatives to the opt-in approach and concluded that "[t]he FCC failed to adequately consider the constitutional implications of its CPNI regulations." *Id.* at 1240.

These determinations must be reversed because the FCC's decision reaches a permissible result under the First Amendment of the U.S. Constitution. Specifically, the conditions for the dissemination of a customer's CPNI by a carrier imposed in the *CPNI Order* do not raise First Amendment commercial free speech issues. Alternatively, to the extent such concerns are raised, the FCC order is consistent with the tests for governmental regulation of such activity established by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. N.Y. PSC*, 447 U.S. 557 (1980).

I. COMMERCIAL FREE SPEECH CONCERNS ARE NOT IMPLICATED BY THE FCC'S CPNI RULES.

As the FCC noted in the *CPNI Order*, as a threshold matter, it is questionable if the restrictions "even implicate constitutionally protected 'speech.'" 13 FCC Rcd at page 814 ¶ 106. The information that is the subject of the CPNI restrictions is, after all, arguably the consumers', not the carriers'.[8] Both Congress and the courts have recognized consumer's interest in protecting privacy with regard to personal communications.[9] Many *state and federal laws* limit the disclosure of personal information by private entities without implicating the First Amendment. For example, the Fair Credit Reporting Act restricts credit agency release of a consumer's credit report and criminalizes unauthorized disclosures by employees of the

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8 The opinion says, *inter alia*, that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Martin v. City of Struthers*, 319 U.S. 141 (1943), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) teach that agencies cannot restrict the speech of either a speaker or his audience in this context, e.g, the CPNI rule infringes carrier's commercial free speech rights. However, those cases are not on point. Each turns on the *method* of communication and *not the use of personal information acquired from business customers to target a particular audience*. The *CPNI Order* does not prevent US West from advertising its services to its customers (*Virginia Pharmacy)* or pamphleteering (*Struthers)* or using direct mail (*Florida Bar)*. All the order prohibits is U S West's nonconsensual use of consumers' confidential data, generated in the course of private activities, to advertise products and services.

9 See, *Edenfield v. Fane*, 507 U.S. 761, 769 (1993)("[P]rotection of potential clients' privacy is a substantial state interest."); *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995).

consumer-reporting agency.[10] Indeed, aside from the 1996 legislation underlying the rules at issue in this proceeding, Congress has recognized the importance of a citizen's privacy interest in CPNI by enacting other statutes preventing disclosure of the same or similar data. For example, Congress enacted an elaborate statutory scheme to protect the privacy of phone communications, (See 18 U.S.C. §§ 2510-2522 (1994 & Supp. III 1997)), and specifically prohibited the use of pen registers without a court order. See 18 U.S.C. § 3121 (1994). Thus, the Congress has determined that people have a legitimate expectation of privacy with respect to the phone numbers they dial and has decided that this information is so sensitive that it has developed an entire statutory scheme governing law enforcement's ability to collect such data. Similar rules have been established to protect the privacy of cable subscriber records. See 47 U.S.C. § 551 (1994).

II. EVEN IF WE ASSUME, ARGUENDO, COMMERCIAL FREE SPEECH CONCERNS ARE IMPLICATED BY THE FCC'S CPNI RULES, THE FCC HAS MET THE SUPREME COURT'S CRITERIA FOR GOVERNMENT REGULATION OF SUCH ACTION.

Even if one assumes, arguendo, that carriers' commercial free speech rights are implicated by the CPNI

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10 See *Fair Credit Reporting Act*, 15 U.S.C. § 1681r (Supp. III 1997); see also *Video Privacy Protection Act of 1988*, 18 U.S.C. § 2710 (1994) (prohibiting disclosure of a consumer's video rental records). *See generally* Marc Rotenberg, *The Privacy Law Sourcebook 1999: United States Law, International Law, and Recent Developments* 1-173 (1999).

rules, the FCC action easily meets the relevant Supreme Court criteria for taking such action. In *Central Hudson* at 564, 566, the Supreme Court says government may regulate commercial speech if it can demonstrate "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."

The majority opinion basically turns on the third prong of the *Central Hudson* test. There is no question that protecting consumers' privacy with respect to sensitive information that is not available in the public domain is a substantial state interest – particularly since Congress segregated it out for separate treatment in the underlying statute. See note 6, *supra*. Nor can it be seriously contended that the CPNI rule adopted directly and materially advances that interest. The majority's opinion however, finds the FCC's rules were not narrowly tailored to advance the government interest. The decision says this "means that the government's speech restriction must signify a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.'" *US West,* 182 F.3d at 1238 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)) (internal quotation marks omitted). The opinion finds that "the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly tailor the CPNI regulations." *Id.* at 1238-39.

Both holdings are flawed. A review of the *CPNI Order* reveals significant evidence that the FCC did carefully calculate the costs and benefits associated with both the opt-in approach the agency settled upon and the opt-out approach referenced by the Court's decision.[11] Moreover, after *Central Hudson*, the Supreme Court subsequently determined the least restrictive means test does not apply to commercial speech, finding: [w]hat our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision-makers to judge what manner of regulation may best be employed.[12] The *Fox* approach requires an investigation of the legislative history of § 222 to determine Congressional goals and for the agency to make a reasonable determination to advance those goals. We believe that the text of the CPNI Order amply illustrates both Congressional intent to protect consumer's personal information and the needed reasonable fit between that goals and the *CPNI Order*. Moreover, it

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11 The CPNI order contained 30 paragraphs discussing "Approval' Under Section 222(c)(1). *See CPNI Order, 63 Fed. Reg.* 20,329-32, 13 FCC Rcd at 8130-31. Indeed, in ¶ 45, *Id.* at 20,330, the FCC specifically considers and rejects arguments that an express approval requirement violates the 1st amendment.

12 *Board of Trustees v. Fox*, 492 U.S. 469 at 480 (1989); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

appears that the opt-in approach adopted by the FCC's CPNI Order reflects Congress's express intent in enacting Section 702 of the Telecommunications Act to protect the privacy of telephone customers. Indeed, this Court explicitly endorsed Congressional authority to create such an opt-in approach in the analogous context of protecting information an individual discloses to her state DMV in *Reno v. Condon*, 120 S. Ct. 666 (2000), decided earlier this Term. [13] For all the reasons stated, we believe the Court should give deference to the agency's findings in this case.[14]

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13 In *Reno*, this Court explicitly upheld a statute that utilizes an opt-in approach to protecting a consumer's personal information. Reno upheld the Driver's Privacy Protection Act of 1994, which prohibits states from disclosing personal information contained in the records of their respective Departments of Motor Vehicles without a driver's express consent. *Id.* The unanimous opinion specifically found that the "sale or release" of the consumer's private information was "in interstate commerce" and "therefore a proper subject of congressional regulation." *Id.* at 671. The FCC's rule's regulating CPNI present a compelling analogous circumstance.

14 In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 at 843-4(1984), the Supreme Court found that whenever a court reviews an agency construction of the provision is ambiguous, the court must defer to a reasonable agency interpretation. Note – in the 10th Circuit's opinion, the Court cited an exception to *Chevron* that applies when an agency's construction of a statute raises constitutional issues, 182 F.3d at 1231, but the opinion appears not to apply the more basic canon that courts give a statute a limited construction to avoid the constitutional issue where possible.

CONCLUSION

For the reasons set forth, supra, NARUC urges the Court to grant the writ of certiorari and reverse the decision of the court of appeals, or alternatively to remand in light of *Reno v. Condon*.

Respectfully submitted,

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